

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
2010 Quadrennial Regulatory Review –)	MB Docket No. 09-182
Review of the Commission’s Broadcast)	
Ownership Rules and Other Rules Adopted)	
Pursuant to Section 202 of the)	
Telecommunications Act of 1996)	
)	
Promoting Diversification of Ownership)	MB Docket No. 07-294
In the Broadcasting Services)	

**REPLY COMMENTS
of the
ORGANIZATION FOR THE PROMOTION AND
ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES**

I. INTRODUCTION

The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO)¹ hereby submits these reply comments in the above-captioned proceedings.² Video is an important component of the service suite provided by rural local exchange carriers (RLECs) in the small markets they serve, particularly as these services appear to help promote broadband adoption. OPASTCO concurs with commenters who urge the Commission to update its attribution rules to reflect cases where separately owned stations that

¹ OPASTCO is a national trade association representing approximately 460 small incumbent local exchange carriers (ILECs) serving rural areas of the United States. Its members, which include both commercial companies and cooperatives, together serve more than 3 million customers. All OPASTCO members are rural telephone companies as defined in 47 U.S.C. §153(37).

² *2010 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 09-182; *Promoting Diversification of Ownership in the Broadcasting Services*, MB Docket No. 07-294, Notice of Proposed Rulemaking, 26 FCC Rcd 17489 (2011) (NPRM).

operate in the same markets coordinate retransmission consent negotiations, as these arrangements undermine competition.

II. THE ATTRIBUTION RULES SHOULD APPLY TO INSTANCES WHERE SEPARATELY OWNED STATIONS IN THE SAME MARKET COORDINATE RETRANSMISSION CONSENT NEGOTIATIONS

The NPRM seeks comment on the Commission's attribution rules,³ which delineate the financial or other interests of a broadcast licensee that the Commission considers when applying its broadcast ownership rules. The Commission should apply the attribution rules in situations where separately owned stations operating in the same market jointly conduct or otherwise coordinate retransmission consent negotiations. As explained below, the record demonstrates that these types of arrangements effectively undermine the Commission's ownership rules, impede competition in the video market and harm the public interest in the very ways that the ownership rules were designed to prevent.

When broadcast stations that normally compete with each other agree to negotiate in tandem for retransmission consent, it predictably results in higher retransmission consent fees which impair competition and localism. The American Cable Association (ACA) shows that affiliates of major networks are able to effectively function as a single entity by coordinating their retransmission consent negotiations within their own markets, enabling them to demand even higher retransmission consent fees than they could obtain otherwise.⁴ The adverse impacts this coordination has on competition and the public interest are, as ACA asserts, no different

³ *Id.*, ¶ 194.

⁴ ACA, p. 9. *See also*, OPASTCO, National Telecommunications Cooperative Association, Independent Telephone and Telecommunications Alliance (ITTA), and Rural Independent Competitive Alliance comments, MB Docket No. 10-71 (filed May 27, 2011) (RLEC retransmission consent comments), pp. 11-12.

from the impacts that would be felt if those stations actually merged, which is prohibited by the Commission's rules.⁵

Unfortunately, these types of coordinated negotiations are on the rise. ACA provides copious data showing significant increases in the instances of network-affiliated broadcasters operating within the same markets conducting retransmission consent negotiations under some kind of collaborative framework. ACA reports that cases of sharing agreements involving affiliates of major broadcast networks have increased by over 10 percent in less than two years, growing from 56 agreements in 50 designated market areas (DMAs) to 62 in 55 DMAs.⁶ Furthermore, ACA also shows that of these 62 instances, 46 cases (involving 41 DMAs) saw retransmission consent negotiations conducted by a single representative for two stations, up from 36 instances in 33 markets two years ago, an increase of nearly 28 percent.⁷

The deleterious effects of these increasingly common practices are clear. It is unquestionably anti-competitive for a separately-owned station to put these pricing decisions into the hands of another station that operates in the same market.⁸ Furthermore, the resulting higher retransmission consent fees are obtained not through market factors such as higher audience share, but through the increased market power gained through coordination, which reduces stations' incentives to compete with one another within their respective DMAs.⁹

Competition is harmed when broadcaster coordination results in dramatically higher retransmission consent fees. Higher fees, regardless of the cause, have had a chilling effect on

⁵ *Id.*, pp. 8-9, citing 47 C.F.R. § 73.3335(b); *see also* ACA, p. 25.

⁶ *Id.*, p. 6; Appendix A, Table 1.

⁷ *Id.*, pp. 7-8; Appendix A, Table 2.

⁸ *Id.*, p. 18. *See also*, ITTA, pp. 3-7; DIRECTV, p. 4.

⁹ *Id.*, p. 21. *See also*, ITTA, pp. 7-8; DIRECTV, p. 5. In addition, ITTA and DIRECTV observe that broadcast networks are increasingly demanding at least partial control over local affiliates' retransmission consent negotiations

the ability of small providers, notably RLECs, to enter the multichannel video programming distributor (MVPD) market. Numerous OPASTCO members have considered using their broadband infrastructure to enter the MVPD market, but have decided against doing so as spikes in retransmission fees undermine the prospects of generating even a modest profit in the high-cost areas they serve. Likewise, the sharp increases in these fees are also driving existing MVPDs out of the market, to the detriment of competition and consumer choice. Specifically, the National Cable Television Cooperative (NCTC) last year reported an alarming 28 instances of market exits in 2010-2011 alone, largely attributable to higher retransmission consent fees that small MVPDs could neither absorb nor pass on to consumers in a sustainable manner.¹⁰ In addition, it has been recognized that the bundling of video and broadband services increases broadband adoption,¹¹ a key goal of the Commission. When coordination leads to significantly higher retransmission consent fees, small providers' capability to enter or remain in the video market, and their ability to improve upon their broadband "take rates," are compromised.

Localism is another Commission goal that is significantly harmed by unreasonably high retransmission consent fees. For example, small MVPDs that operate in a DMA centered in a neighboring state are finding that higher fees make it necessary to eliminate signals from in-state broadcasters that consumers have long relied upon for local news, weather, and other community programming. These customers may retain access to national programming, but they "are not seeing the local news, sports and weather broadcast that they would prefer."¹²

along with portions of that revenue, reducing affiliates' ability to display flexibility in negotiations. *See* ITTA, pp. 9-12; DIRECTV, pp. 6-9. *See also*, RLEC retransmission consent comments, pp. 9-11.

¹⁰ *See*, letter from Rich Fickle, President & CEO, NCTC, to Chairman Julius Genechowski, Sept. 28, 2011.

¹¹ RLEC retransmission consent comments, pp. 4-5.

¹² *See*, Sarah Barry James, *A cable operator's retrans lament*, SNL (March 22, 2010), <http://www.snl.com/InteractiveX/Article.aspx?cdid=A-14492467-12840>.

While not all retransmission consent fee increases arise from coordination, it is imperative for the Commission to update its attribution rules to reflect the increasingly common practice of in-market stations coordinating their retransmission consent procedures. As ACA states:

Simply put, consistent with its long-standing policy goal of preserving and promoting competition in local television markets through operation of its ownership limits, the time has come for the Commission to put a stop to this end run around its rules in this quadrennial review by explicitly recognizing the impact on retransmission consent of certain non-equity interests among separately owned top four rated broadcasters in a single DMA and deeming them attributable ownership interests for purposes of its local television ownership limits.¹³

ACA goes on to recommend that the Commission explicitly recognize that an attributable interest has been created under its rules when broadcasters affiliated with major networks engage in any of the following practices:

- Delegation of the responsibility to negotiate or approve retransmission consent agreements by one broadcaster to another separately owned broadcaster in the same DMA;
- Delegation of the responsibility to negotiate or approve retransmission consent agreements by two separately owned broadcasters in the same DMA to a common third party;
- Any informal or formal agreement pursuant to which one broadcaster would enter into a retransmission consent agreement with an MVPD contingent upon whether another separately owned broadcaster in the same market is able to negotiate a satisfactory retransmission consent agreement with the same MVPD; and
- Any discussions or exchanges of information between separately owned broadcasters in the same DMA or their representatives regarding the terms of existing retransmission consent agreements, or the status of negotiations over future retransmission consent agreements.¹⁴

In order to alleviate the competitive and public interest harms engendered by coordinated retransmission consent negotiations on the part of separately owned same-market broadcasters, OPASTCO concurs with these recommendations.

¹³ ACA, pp. 25-26.

III. CONCLUSION

The record in this proceeding, reinforced by the record in the retransmission consent docket, clearly demonstrates that coordinated retransmission consent negotiations by separately owned broadcasters in the same market undercut the Commission's ownership rules to the detriment of consumers. Accordingly, the attribution rules should be updated to apply to instances where separately owned stations in the same market effectively coordinate retransmission consent negotiations.

Respectfully submitted,

**THE ORGANIZATION FOR THE PROMOTION
AND ADVANCEMENT OF SMALL
TELECOMMUNICATIONS COMPANIES**

By: /s/ Stuart Polikoff
Stuart Polikoff
Vice President – Regulatory Policy
and Business Development

By: /s/ Stephen Pastorkovich
Stephen Pastorkovich
Business Development Director/
Senior Policy Analyst

2020 K Street, NW
7th Floor
Washington, DC 20006

202-659-5990

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¹⁴ *Id.*, p. 27.